Supreme Court, U.S.
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No. 92-1158

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

KAREN M. PHELAN AND CHARLENE PHELAN,
AS CO-ADMINISTRATORS OF THE
ESTATE OF SHANE P. PHELAN,
DONALD V. FITZGERALD AND MARK COTTON
PETITIONERS,

V.

LOCAL 305 OF THE UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES
OF THE UNITED STATES AND CANADA
AND TERRENCE QUINN
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO RESPONDENTS' BRIEF

A. CONFLICT BETWEEN SECOND AND SEVENTH CIRCUITS

In an effort to mask the conflict between the Second Circuit's decision in this case and the Seventh Circuit's decision in Harris v. Plasterers & Cement Masons Local No. 406, 619 F.2d 1164 (7th Cir. 1980), the Respondents incorrectly characterize Harris as a case decided on the basis of agency. (Respondent's Brief at 10). Their argument is that since Harris was decided on the basis of agency, and since liability in this case is not based on agency, the conflict is illusory. In Harris, the offending local (Local 406) had been delegated power by the International's constitution to impose fines on the plaintiffs. The plaintiffs had to pay the fines, or else be expelled from the International and their home

locals. 619 F.2d 1164.

There is nothing in Harris which even hints at Local 406 playing the role of an agent. "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement (Second) of Agency, Section 1 (1958). The plaintiffs' home locals had not instructed Local 406 to be their agents in disciplining the plaintiffs. Rather, Local 406, exercising power delegated to it by the International constitution, acted on its own. The locals were autonomous and equal; neither was the agent of the other. But because Local 406 "had jurisdiction ... under the constitution of the International" to impose fines, it had the power to take actions which created a ripple effect,

resulting in the expulsion of the plaintiffs from their home locals. 619 F.2d at 1167.[1]

The case at bar is fundamentally the same. Local 305 and Terrence Quinn, exercising the jurisdiction delegated to them by the International's constitution, ran the traveling system in their locality. They were not Patrick Quinn's agents (though they were his co-conspirators), and they took actions within their jurisdiction to deprive the plaintiffs of their referral rights as

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[1] The Respondents devote a sizable portion of their brief to arguing that union locals are autonomous. The Petitioners never argued differently. However, an International's constitution regulates the relations between and among locals and union officials. The constitution defines and delineates the authority and responsibility of each, and it is the source of authority for each local and each local official in their dealings with other locals and other officials.

part of a scheme to suppress Petitioners' rights of free speech, association and access to the NLRB. Thus, the fact that the Second Circuit and the Seventh Circuit decided differently presents an irreconcilable conflict between circuits.

The Respondents argue that under Gavin v. Structural Iron Workers Local No. 1, 553 F.2d 28 (7th Cir. 1977) even the Seventh Circuit would have dismissed the plaintiffs' claims in the case at bar. They are wrong about Gavin. In Gavin, several putative transferees from other locals complained that Local 1 would not take them in as members. All but one of the plaintiffs had their cases dismissed, not on jurisdictional grounds but on the substantive ground that they had not stated a claim. The Seventh Circuit ruled that because the International had recently amended its constitution to

give the local discretion to reject applicants, all but one of the plaintiffs had to fail. However, the Seventh Circuit was very explicit in stating that if the constitution had not been amended to confer discretion on the local, the plaintiffs would have stated a valid LMRDA claim. In fact, for a plaintiff named Coyne, who had been rejected for membership before the constitution was changed, the Seventh Circuit permitted his case to proceed.

Gavin's relevance to this case is that it **strengthens** the Petitioners' claims. Under the travel card provision of the International constitution, Terrence Quinn and Local 305 had no discretion to turn the plaintiffs away. The Respondents were required by the International constitution to accept the travel cards and refer the Petitioners out

to work.

B. RESPONDENTS' MISLEADING ACCOUNT OF DECISIONAL LAW

The Respondents are extremely misleading when they list a string of cases which supposedly demonstrate that decisional law has consistently gone against the Petitioners' claims. (The list appears on pages 6-7 of the Respondents' brief). Of the ten cases listed, 7 of them stand for the proposition that employers, or independent entities financed and partly controlled by employers, are not subject to LMRDA suits. In other words, to make it appear that the weight of decisional law goes against the Petitioners, the Respondents cited seven cases saying the same thing, none of which are relevant to the case at bar.

Abrams v. Carrier Corp., 434 F.2d

1234 (2nd Cir. 1970), Thompson v. New York Central Railroad Company, 361 F.2d 137 (2nd Cir. 1966), Duncan v. Peninsula Shipbuilding Ass'n, 394 F.2d 237, Tobin v. Barry, 678 F.Supp. 1018, 1019-1020 (S.D.N.Y. 1987), and Hayes v. Consolidated Service Corporation, 517 F.2d 564 (1st Cir. 1975), all hold that employers cannot be sued under the LMRDA. This rule is based on the fact that the LMRDA was designed to promote internal union democracy. Employers by definition do not impact on internal democratic processes and do not act under color of union authority. Bass v. International Broth. of Boilermakers Local 582, 630 F.2d 1058 (5th Cir. 1980) and Miller v. Holden, 535 F.2d 912 (5th Cir. 1976) hold that the LMRDA does not provide jurisdiction over a joint trust that is completely independent of the union, which is financed by employers,

and which is fifty-percent controlled by employer-appointed trustees. Bass, 630 F.2d at 1066. Miller, 535 F.2d at 914. These cases are merely subsets of the employer cases discussed above. This is particularly clear in Bass, where the court held that if there had been evidence that the trust was an alter ego of the union, there would be LMRDA jurisdiction. 630 F.2d at 1066.

Gavin v. Structural Iron Workers Local No. 1, 553 F.2d 28 (7th Cir. 1977) has already been discussed. Suffice it to say that its holding is not, as Respondents claim, that union members cannot bring a claim against a union local to which they do not belong.

Similarly, Maier v. Patterson, 553 F.Supp. 150 (E.D. Pa 1982) does not hold, as Respondents suggest, that the LMRDA cannot support a claim against an

individual union officer acting without authority from the local. In Maier, the district court directed a verdict against the union and against a union official in his official capacity. Contrary to the respondent's contention, the court did not dismiss claims brought against the union official individually. The court's directed verdict was an evidentiary decision, not a jurisdictional one. In fact, it is clear the Maier court believed the LMRDA did confer jurisdiction to hear the case, for the court had previously denied summary judgment motions and permitted the case to go to a trial.

The remaining case, Tomko v. Hilbert, 288 F.2d 625 (3d Cir. 1961), was a dismissal of a claim which did not implicate union democracy. A union official had committed a private tort, but had not done it to infringe the

plaintiffs' LMRDA rights. The reasoning of the case is fundamentally the same as the employer and trust fund cases: The LMRDA was designed as a weapon in the fight for union democracy, and cases which have nothing to do with union democracy are not LMRDA cases. 288 F.2d at 629.

Taken together, the cases cited by the Respondents say nothing more profound than that the LMRDA was meant to enforce union democracy. They are not relevant to the case at bar, since this was first, last, and always a union democracy case.

C. MERITS OF THE CASE AND LEGISLATIVE HISTORY

Much of the Respondents' brief is devoted to discussing the merits of the case rather than the question of whether this Court should grant certiorari. The Petitioners are therefore compelled to

give at least a brief response.

The Petitioners were not members of Local 305, but the International's constitution guaranteed to them many of the privileges of membership. The Petitioners had an absolute right to register with Local 305 and to get job referrals along with Local 305 members and all other travelers. They also had the right to attend meetings of Local 305 and to demand protection by Local 305 and Terrence Quinn in all events occurring within Local 305's geographical area. The constitution also imposed obligations on the Petitioners. They were required to pay dues to Local 305 and to abide by Local 305's rules and practices.

Section 101(a)(2) of Labor Management Reporting and Disclosure Act of 1959 guarantees that **every "member** of any labor organization ... shall have the right to

meet and assemble freely with other members; and to express any views, arguments, and opinions...." (emphasis added) Section 101(a)(4) guarantees unfettered access to administrative bodies like the NLRB. The Petitioners were members of a labor organization, so it is clear the LMRDA protected their freedom of speech and association and access to the NLRB.

Section 102 of the LMRDA, 29 U.S.C. Section 412, gives a private right of action **to all individuals** protected by Section 101(a)(2) and (4). **"Any person** whose rights secured by the provisions of this title have been infringed ... may bring a civil action...." (emphasis added) Since the plaintiffs were union members whose protected union rights were infringed, Section 102 by its plain terms was available to the plaintiffs to sue the

perpetrators.

The prerequisite of union membership refers to **plaintiffs**, not to defendants. There is nothing in the statute which even hints at a requirement that, in addition to the plaintiff being a union member, he or she must also be a full-fledged member of the defendant union. In fact, the second sentence of Section 102 suggests the very opposite. It is a venue provision to be applied when the defendant is a union. The clear implication is that the statute has broader application than use solely against a union of which the plaintiff is a member. If this were not so, the second sentence would be redundant.

The legislative history shows the LMRDA was designed to cover the Petitioners' actions against both Local

305 and Terrence Quinn.[2] Senator McClellan, a chief architect of the LMRDA, made it clear the purpose of the law was to protect union members from reprisals of **all kinds**. During the legislative hearings on the LMRDA, Senator McClellan stated that the purpose of Title I of the LMRDA was

> to prescribe and define by law

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[2] It should be remembered that separate claims were brought against Local 305 and Terrence Quinn, and the jury found that each of them had engaged in the scheme to suppress dissent. It is conceivable that, if this Court were to adjudicate this case on the merits, the verdict against Terrence Quinn could be upheld even while holding that the LMRDA did not grant jurisdiction over the Petitioners' claim against Local 305. Though the Petitioners would not urge this result, such a result would go a long ways toward resolving at least the conflict between the Second Circuit's decision below, and Shimman v. Frank, 625 F.2d 80 (6th Cir. 1980), Morrissey v. NMU, 544 F. 2d 19 (2d Cir. 1976), and Keene v. International Union of Operating Engineers, 569 F.2d 1375 (5th Cir. 1978). This conflict is discussed in the Petition, at pages 20-25.

> what the rights of union members are, place in them by the democratic process the power to secure those rights, and protect them in their efforts to do so from **reprisals of any kind** .... Without such protection, other provisions of law may be of little benefit and meaningless. ... [T]he records of our committee's investigations show over and over again that a rank-and-file member dare not risk any opposition to a corrupt or autocratic leadership. If he does so, he may be beaten, his family threatened, his property destroyed or damaged, and he may be forced out of his job -- all of these things can happen and have happened.

II NLRB, Legislative History of the LMRDA at 1098 (1959) (emphasis added).

Senator McClellan's broad definition of reprisals included job loss, bodily harm, and threats to family; but he did not stop there -- he called for a halt to reprisals of "any kind". The legislative history demonstrates that Congress sought to guard against infringements of LMRDA rights from any sources associated with

union leadership, whether or not the reprisals were actually carried out by the union officials with direct control over members' rights. Senator McClellan specifically referred to the practice by which union officials recruited others to accomplish the infringement of members' rights:

> Union officers send to other places and bring in thugs and hoodlums. If a union member undertakes to speak ... they move over toward him and say, "Be quiet, Bud. You are out of order." And he had better be quiet, too. They mean business.

Id. at 1103.

The Petitioners' situations are analogous to the ones described by Senator McClellan, the only difference being that in his example "hoodlums" -- rather than a sister local or the business manager of that local -- acted to infringe the union members' free speech rights.

Congress did not intend LMRDA jurisdiction to turn on technicalities such as whether the perpetrator was an agent, co-conspirator, independent contractor, or something else. Yet this is precisely how the Second Circuit and the Respondents would have it. To hold that there was no LMRDA jurisdiction over Respondents because Respondents were "merely" co-conspirators and not agents is exalting form over substance.[3] As long as the pepetrators were acting under color of union authority, engaged in a scheme to suppress dissent within the union, there should be LMRDA jurisdiction. Shimman v. Frank, 625 F.2d 80 (6th Cir. 1980). Morrissey v. NMU, 544 F. 2d 19 (2d Cir. 1976). Keene v. International Union of Operating Engineers, 569 F.2d 1375 (5th

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[3] "Agency" is defined above, on page 2.

Cir. 1978).

D. RESPONDENTS' EFFORT TO TRIVIALIZE THIS CASE

In an effort to convince this Court not to consider this case on the merits, the Respondents characterize it as presenting a "hyper-technical question ... [which] has no general, practical import." (Respondents' Brief at 9.) But when this case was pending before the Second Circuit, the Respondents sang a different tune, arguing to the Second Circuit that great damage would accrue to unions if the trial court were upheld. In fact, the Building and Construction Trades Department of the AFL-CIO was invited to submit an amicus brief, and the AFL-CIO stated:

> The acceptance of plaintiffs' arguments would seriously disrupt the existing practices concerning travellers and transfers. That disruption would, in turn, have an adverse

> effect on the essential functions of local labor organizations in [the construction] industry .... This deleterious effect upon the workings of construction industry labor organizations stands as additional support for reversing the ruling of the court below on this issue.

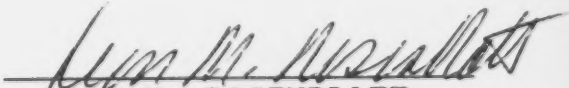
Amicus Brief filed by the Building and Construction Trades Department, AFL-CIO, at page 16.

The truth is, both sides know that this is a very important case, which will have far-reaching impact whether or not the Supreme Court grants this petition. If the petition is granted, the ultimate outcome is of course unknown. But it is certain that if the petition is not granted, the Second Circuit's decision will be a heavy constraint on union members in the construction industry when they consider whether or not to exercise their democratic rights.

CONCLUSION

The Respondents were not able to reconcile the express conflict between the Second and Seventh Circuits, between this case and Harris. They did not even try to reconcile the unexpressed, but nevertheless real, conflict between this case and other circuit cases extending LMRDA jurisdiction to claims against all persons operating under color of union authority who are engaged in schemes to suppress dissent within the union. Because of these conflicts, and because there is so much at stake for democratic unionism, this Petition should be granted.

Respectfully submitted,



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